IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 12.12.2006

Coram

THE HONOURABLE MR. A.P.SHAH, THE CHIEF JUSTICE
and
THE HONOURABLE MR. JUSTICE K. CHANDRU

Writ Appeal No.1504/2006
and M.P.No.1 of 2006
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1. The District Manager
   Bata India Limited
   C-171, III Phase
   Spencer Plaza, Anna Salai, Chennai-2.
2. Bata India Limited,
   83, Industrial Second Subrub
   Yeshwantpur, Bangalore-560 022.
3. Bata India Limited
   Bata House, 418/02, Section 17,
   Gurgaon-Mehrouli Road, Gurgaon-122 002.

.. Appellants

Vs.

1. Deputy Commissioner of Labour I
   DMS Anna Salai, Chennai-6.
2. N. Padmanabhan
   Secretary, Chennai Zone, All India Bata
   Shop Manager Union, 24, 10th Avenue
   Ashok Pillar, Ashok Nagar, Chennai-83.

.. Respondents

PRAYER: Writ Appeal filed under Clause 15 of the Letters Patent against the order of the learned single Judge dated 14.9.2006 passed in Writ Petition No.32987 of 2006. To issue a writ of Mandamus directing the first respondent and to issue exemption order arbitrarily for keeping open the bata shops in Chennai Zone for seven days a week and to extend the working hours without hearing the petitioner and also direct the second, third and fourth respondents not to take

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unilateral disciplinary actions including taking charge of the shops, against Shop Managers who are members of the Petitioner's Chennai Zone.

For Appellants : Mr. A.L. Somayaji
Senior counsel for Mr. S.Jayaraman

For 1st respondent : Mr. Raja Kalifullah
Government Pleader assisted by
Mr.V.R.Thangavelu,Govt.Advocate

For 2nd respondent : Mr.S. Badrinathan

J U D G M E N T
(Judgment of the Court was delivered by
The Honourable The Chief Justice)

Admit. Mr. Raja Kalifullah, learned Government Pleader waives service for the first respondent and Mr. S. Badrinathan, learned counsel waives service for the 2nd respondent. By consent, the writ appeal is taken up for hearing forthwith.

2. This writ appeal is directed against the order passed by the learned single Judge dated 14.9.2006 in W.P.No.32987 of 2006. The writ petition was filed by the second respondent herein for a direction to the Deputy Commissioner of Labour-I, Chennai, the first respondent herein, not to issue exemption order under the Tamil Nadu Shops and Establishment Act, 1947 (hereinafter referred to as 'the Act') in favour of the respondents 2 and 4 in the writ petition i.e., appellants herein, for keeping open the Bata shops in Chennai Zone for seven days a week and to extend the working hours without hearing the 2nd respondent Union and for a further direction to the appellants/respondents 2,3 and 4 in the writ petition, not to take unilateral disciplinary actions including taking charge of the shops, against the shop managers, who are members of the 2nd respondent union. By the impugned order, the learned single Judge directed the first respondent to conduct enquiry as contemplated in the provisions of the Act by giving opportunity to the petitioner as well as the respondents 2 to 4 and pass appropriate orders as per the Act, by considering the representation of the petitioner dated 6.8.2006 within a period of four weeks from the date of receipt of copy of the order, and in the mean time, pending on passing such order by the first respondent, respondents 2 to 4/ appellants were directed to maintain status quo as on date in respect of the

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employees, in opening of the shops on holidays during the week. It is the admitted position that the appellants were not heard and the order was passed without notice to them. However, since the issue involved in the petition is pure question of law with regard to the power of the authority, both counsel agreed that instead of remitting the matter to the learned single Judge, the writ petition may be disposed of by this Bench.

3. Mr. A.L.Somayaji, learned senior counsel appearing for the appellants strenuously contended that under the provisions of Section 5 of the Act read with G.O.Ms. No.2943 dated 31.12.1980, the first respondent has the power to grant exemption to the appellants from declaring the weekly holiday as a working day for a period of one year at a time so long as the workmen or the staff are not deprived of one day as holiday in a week as per Section 11(2) of the Act. He submitted that there is no statutory obligation to hold a regular enquiry as observed by the learned single Judge. He submitted that the notification issued under Section 5 of the Act, exempting the shops from operation of the provisions of the Act, is a piece of conditional legislation and hence no one can insist on notice or hearing before it is legislated or allege non-application of mind. He submitted that it is open to the employer to organise the working hours and holidays without prejudice to the rights of the workmen and the direction given by the learned single Judge to the first respondent to conduct enquiry is not contemplated either under the Act or the Rules framed thereunder.

4. In reply, the learned counsel appearing for the 2nd respondent submitted that the orders issued by the first respondent from time to time were null and void as no opportunity of hearing was given to the employees while issuing impugned orders which had a direct pernicious and adverse effect on their civil rights and amounted to depriving them of their statutory rights under the Act. He submitted that implicit in Section 5 of the Act is the requirement for the competent authority to have a look at the rival contentions which may have to be put forward before the competent authority by the claimants of exemption on the one hand and their employees likely to be adversely affected by such exemptions on the other hand, before such power of exemption having pernicious civil consequences could be visited on the employees for whose benefit such welfare legislation has been enacted by the State Government.

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5. Before adverting to the rival contentions of the parties, we may briefly refer to the relevant provisions of the Act. The preamble of the Act shows that the Act has been enacted to provide for the regulation of conditions of work in shops, commercial establishments,restaurants, theatres and other establishments, and for certain other purposes. There was no enactment in this Province regulating the conditions of work of

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employees in shops, commercial undertakings, restaurants etc. The Weekly Holidays Act, 1942, which has been brought into force in this Province from 1st January,1947 is limited in scope in that it provides only for the grant of holidays and does not contain provisions for various other matters affecting them such as hours of work, payment of wages, health and safety. It was therefore considered that there should be a comprehensive measure in this Province to regulate these matters on the lines of similar enactments in force in other Provinces.

6. Section 1(3) of the Act makes the provisions of the Act applicable to the City of Madras and all the Municipalities constituted under the Madras District Municipalities Act, 1920 as well as the areas within the jurisdiction of Panchayats which were classified by the State Government as Clause I Panchayats or major Panchayats. Section 2(6) defines "establishment" means a shop, commercial establishment, restaurant, eating house, residential hotel, theatre or any place of public amusement or entertainment and includes such establishment as the State Government may by notification declare to be an establishment for the purpose of the Act. Section 5 of the Act deals with the power of exemption which reads as under:

> Notwithstanding anything contained in Section 4 the (State) Government may, by notification apply all or any of the provisions of this Act to any class of persons or establishments mentioned in that Section, other than those mentioned in clauses (c) and (f) of sub-section(1), and modify or cancel any such notification.

7. Section 7 lays down that no shop shall on any day be opened earlier or closed later than such hours as may be fixed by the State Government by a general or special order in that behalf. Section 9 provides that subject to the provisions of the Act, no person employed in any shop shall be required or allowed to work therein for more than eight hours in any day and forty eight hours in any week. Section 11(1) provides that every shop shall remain entirely closed on one day of the week which day shall be specified by the shop-keeper in a notice permanently exhibited in a conspicuous place in the shop and the day so specified shall not be altered by the shop-keeper more often than once in three months. Section 11(2) provides that every person employed in a shop shall be allowed in each week a holiday of one whole day. Section 11(5) inter alia states that the weekly day on which a shop is closed in pursuance of requirement under sub-section (3) shall be specified by the shop-keeper in a notice permanently exhibited in a conspicuous place in the shop and shall not be altered by the shopkeeper more often than once in three months.

8. Section 14(1) of the Act provides that subject to the provisions of the Act, no person employed in any establishment shall be required or allowed to work for more than 8 hours in any

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day and 48 hours in any week. But proviso to sub Section (1) provides that any such person may be allowed to work in such establishment in excess of the time limit fixed under this sub Section subject to payment of overtime wages provided the period of work including overtime work, does not exceed 10 hours in any day and in the aggregate 54 hours in any week. Section 14(2) lays down that no person employed in any establishment shall be required or allowed to work in such establishment for more than 4 hours in any day unless he has had an interval for rest of at least one hour. Section 48 of the Act provides that the State Government may, by notification, authorize any officer or authority subordinate to them, to exercise any one or more of the powers vested in them by or under this Act, except the power mentioned in Section 49, subject to such restrictions and conditions, if any, as may be specified in the notification. Pursuant to the powers under Section 48 the power of the State Government under the Act has been delegated to the first respondent i.e., the Deputy Commissioner of Labour - I vide G.O.Ms.No.2943, Labour and Employment dated 31.12.1980.

9. The short but important question which falls for our consideration is whether the competent authority in exercise of power under Section 5 to grant exemption is required to grant hearing to the employees likely to be affected by such exercise of power of exemption before issuing such orders?

10. The principle contention of Mr.Somayaji, is that the power exercised by the first respondent under Section 5 of the Act is a piece of conditional legislation and the employees or their union had no right to be heard before the same was issued by the competent authority. He referred to the decision of the Supreme Court in The Tulsipur Sugar and Co. Ltd. Vs. The Notified Area Committee, Tulsipur (AIR 1980 SC 882) wherein the Supreme Court has observed as follows: (AIR pp.886 & 887)

> "Para - 6:- The solution to the question raised before us principally depends upon the nature of the function that is performed by the State Government under Section 3 of the Act. If that function is judicial or quasi-judicial involving adjudication of the rights of any person resulting in civil consequences, it no doubt becomes necessary to follow the maxim audi alteram partem (hear the other side) before taking a decision. It is also true that in order to establish that a duty to act judicially applies to the performance of a particular function, it is no longer necessary to show that the function is analytically of a judicial character or involves the determination of a lis inter parties; though a presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or

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inquiry or where the decision is one entailing the determination of disputed questions of law and fact.

Para – 8: We are concerned in the present case with the power of the State Government to make a declaration constituting a geographical area into a town area under Section 3 of the Act which does not require the State Government to make such declaration after giving notice of its intention so to do to the members of the public and inviting their representations regarding such action. The power of the State Government to make a declaration under Section 3 of the Act is legislative in character because the application of the rest of the provisions of the Act to the geographical area which is declared as a town area is dependent upon such declaration. Section 3 of the Act is in the nature of a conditional legislation. Dealing with the nature of functions of a non-judicial authority, Prof.S.A. De Smith in Judicial Review of Administrative Action (Third Edition) observes at page 163 :-

'However, the analytical classification of a function may be a conclusive factor in excluding the operation of the audi alteram partem rule. It is generally assumed that in English law the making of a subordinate legislative instrument need not be preceded by notice or hearing unless the parent Act so provides'".

11. Mr.Somayaji, also drew our attention to the judgment of the Supreme Court in Kerala State Eelericity Board Vs. Indian Aluminium Co. Ltd., AIR 1976 SC 1031 wherein the legislation dealing with control of essential articles was assailed. Thereunder, the executive was empowered to pick up commodities for being treated as essential articles and made subject to the legislation. Exception was taken to this power conferred upon the executive. The majority of the Court speaking through Mr. Justice Alagiriswami held as follows: (AIR p.1048)

".... we are of the opinion that the power conferred by the Kerala Act is a case of conditional legislation as contemplated in the above decision. The various types of powers that can be exercised under that Act are enumerated in it. Only the articles with reference to which those powers are to

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be exercised is left to be determined by the executive. That will vary from time to time; at one time salt may be an essential article, at another time rice may be an essential article and on a third occasion match boxes."

12. Mr. Somayaji, next referred to the decision of the Constitution Bench of Supreme Court in Hamdard Dawakhanna (Wakf) Lal Kuan, Delhi and Another Vs. Union of India and Others, 1960 (2) SCR 671 wherein Kapur, J., speaking for the Constitution Bench has made the following observations at page 695 of the Report:

" .... the distinction between conditional legislation and delegated legislation is this that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective: Hampton and Co., vs U.S. 276 U.S.394 and the latter involves delegation of rule making power which constitutionally may be exercised by the administrative agent. This means that the legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by delegated legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation power of legislation is exercised by the legislature conditionally, leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend:(The Queen vs Burah 1878 App. Cas 889; Russell vs The Queen 1882 7 App. Cas.829, 835, King Emperor vs Venorialal Sarma, 1944 L.R. 721,.57;Sardar Inder Singh Vs State of Rajasthan, 1957 SCR 605. Thus when the delegate is given the power of making rules and regulations in order to fill in the details to carry out and subserve the purposes of the legislation the manner in which the requirements of the statute are to be met and the rights therein created to be enjoyed it is an exercise of delegated legislation. But when the legislation is complete in itself and the legislature has itself made the law and the only function left to the delegate is to apply the law to an area or to determine the time and manner of carrying it into effect, it is conditional legislation."

13. Mr. Somayaji, also referred to the decision of a Division Bench of Bombay High Court in Transport and Dock Workers' Union Vs. Food Corporation of India reported in 1986 Lab

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IC 1393. The Bombay High Court following the Tulsipur Sugar Company case and Kerala State Electricity Board case held that exercise of power of exemption under Section 4 of Bombay Shops and Establishments Act, 1948 is a piece of conditional legislation and hence the employees cannot insist on notice or hearing before it is legislated or alleged non application of mind. The Court held that there is nothing in Section 4 to compel the inference that a notice and hearing were required, once it is held that the notification constituted conditional legislation.

14. The learned counsel for the 2nd respondent, however, submitted that the judgment of the Bombay High Court is no longer good law, in view of the subsequent judgment of the Supreme Court in State of Tamil Nadu Vs. Sabanayagam and Others, 1998 (1) LLJ 214. This is a landmark judgment where the Supreme Court extensively considered the nature, distinction and scope of conditional and delegated legislation in the field of administrative law. The question before the Bench was whether the impugned notifications exempting the Tamil Nadu State Housing Board under Section 36 of the Payment of Bonus Act, 1965 were void for the reason that no hearing was given to those employees who were affected by it. The Supreme Court concluded after elaborate discussion that the High Court's decision that the impugned notifications under Section 36 were null and void had to be upheld not on the ground that hearing personal or otherwise was not given to the employees but on the ground that the procedure for exercise of powers of conditional legislation was admittedly not followed by the appellant State while passing the impugned orders of exemption in favour of Housing Board. In that case, the State of Tamil Nadu granted exemption in favour of the Housing Board under Section 36 of the Payment of Bonus Act. In the writ petitions filed by the employees of the Housing Board, this Court took the view that the Housing Board is not entitled on the facts of the case to earn statutory exemption under Section 32(v)(c) of the Payment of Bonus Act and the orders of exemption issued by the State of Tamil Nadu in exercise of its powers under Section 36 of the said Act in favour of the Housing Board for the relevant years, were not legally sustainable. This Court also held that in any case the State of Tamil Nadu had no authority to retrospectively grant exemption under Section 36 of the Act for the earlier accounting years. Consequently, the Housing Board was directed to make payment of statutory bonus to the employees from accounting year 1978-1979 onwards. The contention of the Housing Board before the Supreme Court was that the power under Section 36 of the Act is a conditional legislation and the employees were not entitled to any prior notice or hearing.

15. The Supreme Court after a detailed analysis of various reported decisions has observed that the conditional legislation can be broadly classified into three categories. The first

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category is when the Legislature has completed its task of enacting a statute, the entire superstructure of the legislation is ready but its future applicability to a given area is left to the subjective satisfaction of the delegate who being satisfied about the conditions indicating that the time is ripe for applying the machinery of the said Act to a given area exercises that power as a delegate of the parent legislative body. When the Act itself is complete and is enacted to be uniformly applied in future to all those who are to be covered by the sweep of the Act, the Legislature can be said to have completed its task. All that it leaves to the delegate is to apply the same uniformly to a given area indicated by the parent Legislature itself but at an appropriate time. This would be an act of pure and simple conditional legislation depending upon the subjective satisfaction of the delegate as to when the said Act enacted and completed by the parent Legislature is to be made effective. As the parent Legislature itself has laid down a binding course of conduct to be followed by all and sundry to be covered by the sweep of the legislation and as it has to act as a binding rule of conduct within that sweep and on the basis of which all their future actions are to be controlled and guided, it can easily be visualised that if the parent Legislature while it enacted such law was not required to hear the parties likely to be affected by the operation of the Act, its delegate exercising an extremely limited and almost ministerial function as an agent of the principal Legislature applying the Act to the area at an appropriate time is also not supposed and required to hear all those who are likely to be affected in future by the binding code of conduct uniformly laid down to be followed by all within the sweep of the Act as enacted by the parent Legislature. The maxim of audi alteram partem does not become applicable to the case by necessary implication.

16. The Supreme Court then pointed out that there may be second category of conditional legislations wherein the delegate has to decide whether and under what circumstances a completed Act of the parent legislature which has already come into force is to be partially withdrawn from operation in a given area or in given cases so as not to be applicable to a given class of persons who are otherwise admittedly governed by the Act. When such a power by way of conditional legislation is to be exercised by the delegate a question may arise as to how the said power can be exercised. In such an eventuality if the satisfaction regarding the existence of condition precedent to the exercise of such power depends upon pure subjective satisfaction of the delegate and if such an exercise is not required to be based on the prima facie proof of factual data for and against such an exercise and if such an exercise is to uniformly apply in future to a given common class of subjects to be governed by such an exercise and when such an exercise is not to be confined to individual cases only, then even in such category of cases while exercising conditional legislative powers the delegate may not be required to have an objective

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assessment after considering rival versions on the data placed before it for being taken into consideration by it in exercise of such power of conditional legislation. In the aforesaid first two categories of cases delegate who exercises conditional legislation acting on its pure subjective satisfaction regarding existence of conditions precedent for exercise of such power may not be required to hear parties likely to be affected by the exercise of such power. But there may be a third category of cases wherein the exercise of conditional legislation would depend upon satisfaction of the delegate on objective facts placed by one class of persons seeking benefit of such an exercise with a view to deprive the rival class of persons who otherwise might have already got statutory benefits under the Act and who are likely to lose the existing benefit because of such a power by the delegate. In this regard, the observations of the Supreme Court in paras 18,19, and 21 are pertinent. (LLJ pp.227 to 230)

> "18. But there may be a third category of cases wherein the exercise of conditional legislation would depend upon satisfaction of the delegate on objective facts placed by one class of persons seeking benefit of such an exercise with a view to deprive the rival class of persons who otherwise might have already got statutory benefits under the Act and who are likely to lose the existing benefit because of exercise of such a power by delegate. In such type of cases the satisfaction of the delegate has necessarily to be based on objective consideration of the relevant data for and against the exercise of such power. May be such an exercise may not amount to any judicial or quasi-judicial function, still it has to be treated to be one which requires objective consideration of relevant factual data pressed in service by one side and which could be tried to be rebutted by the other side who would be adversely affected if such exercise of power is undertaken by the delegate. In such a third category of cases of conditional legislation the Legislature fixes up objective conditions for the exercise of power by the delegate to be applied to past or existing facts and for deciding whether the rights or liabilities created by the Act are to be denied or extended to particular areas, persons or groups. This exercise is not left to his subjective satisfaction nor it is a mere ministerial exercise. Section 36 of the Act with which we are concerned falls in this third category of conditional legislative functions. A mere look at the said Section

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shows that before an appropriate Government can form its opinion regarding grant of partial or full exemption to any establishment or class of establishments which are otherwise already covered by the sweep of the Act the following factual conditions must be found to have existed at the relevant time to enable the delegate to exercise its powers under the Act:

1. The financial position of the establishment or class of establishments, as the case may be, must be such that it would not be in public interest to apply all or any of the provisions of the Act to such establishment or establishments.

2. There may be other relevant circumstances pertaining to such establishment or establishments which would require exercise of such power of exemption.

3. Such exercise must be in public interest as a whole and not confined to the personal or private interest of the establishment or establishments concerned.

19. Now it is obvious that but for the exercise of power of exemption under Section 36 the employees of an institution governed by the sweep of the Act would be entitled to minimum statutory bonus as per Section 10 of the Act. It ha also to be keep in view that Bonus Act is a piece of welfare legislation enacted for the benefit of a large category of workmen seeking a living wage to make their lives more meaningful and for fructifying the benevolent guarantee of Article 21 of the Constitution of India. Bonus is treated as deferred wage. When the Parliament in its wisdom has enacted such a beneficial piece of social legislation which already guarantees minimum statutory bonus to employees governed by it, if their employers are to be allowed to earn exemption from the sweep of such a beneficial legislation which would ipso facto adversely affect entire class of their employees, the conditions for exercise of such power of exemption have to be strictly and objectively fulfilled by the repository of such a drastic power. A statutory right already accrues to employees under the Act. If the establishment employing such workmen or employees is

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desirous of depriving the statutory rights of minimum bonus to its employees it may move the appropriate Government for exemption under Section 36 of the Act as has been done in the present case by the Housing Board obviously confining its request to the accounting years in question. It is obvious that when such an establishment moves the appropriate Government invoking its power of exemption it has to submit relevant factual data about its financial position and other relevant circumstances in which it is placed during the relevant year which would neceuial datasitate the appropriate Government in public interest and not necessarily only in the private interest of such employer or establishment to get satisfied that it should be exempted and insulated from the rigours of the provisions of the Act guaranteeing statutory minimum bonus to its employees. Such establishment, therefore, would naturally point out its financial position and other relevant circumstances are such that it may be that if it is required to pay the minimum bonus to its employees it would not only be catastrophe for such establishment or class of establishments but a situation might arise when in public interest such establishments in order that they may effectively exist and may not be wiped off, may be given a statutory protection by way of exemption from the operation of the relevant provisions of the Act by the appropriate Government under Section 36 of the Act. It is obvious that when such a case is tried to be made out by the establishment concerned invoking powers of the State under Section 36, the State would not act merely as a post office and accept as a gospel truth what the establishment states. It will have to apply its objective mind on the relevant data before it can legitimately exercise its power of exemption under Section 36 of the Act qua such an establishment or a class of them. While exercising that power the data which would be available from the establishment would obviously be one-sided data in support of its claim for exemption. The employees who are likely to be deprived of their minimum statutory bonus as per the Act would be the rival class of persons who are necessarily liked to be adversely affected

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if such exemption is granted to the establishment on the basis of the one-sided data in support of its claim. Therefore, in the absence of any rebuttal data furnished by the other side which is likely to be affected by such an exercise, namely, the employees the opinion arrived at by the appropriate Government, purely based on the one-sided version and data submitted by the establishment or a class of establishments for claiming exemption, would be a truncated opinion which would necessarily not amount to an opinion on all relevant facts placed before it for and against the exercise of such power of exemption qua a given establishment or a class of establishments. If such data is rebuttal is not allowed to be furnished to the appropriate Government before it decides to exercise its power of exemption under Section 36 of the Act qua the establishment or a class of establishments its decision would always remain a truncated or a lopsided one and would be liable to be voided on the ground of non application of mind on relevant facts and data. It would remain a still-born decision and the moment it is challenged in a competent Court it would be liable to be struck down immediately and for consideration of such a challenge the competent Court seized of the matter would naturally require the other side, which is likely to be affected by such an exercise of power of exemption, to furnish its data by way of rebuttal and once such material is furnished the truncated and one-sided decision of the appropriate Government would be required either to be reconsidered by the Government itself or the Court may be required to perform that task which was left incomplete by the appropriate Government while arriving at its opinion for exempting the claimant-establishment from the rigours of the Act. In that eventuality there would always be the necessity of remanding the proceedings for reconsideration by the appropriate Government and then the appropriate Government will have to consider not only the data furnished by the establishment claiming the exemption but also the data in rebuttal which will travel to the appropriate Government via the Court's order and thereafter the appropriate Government will have to undertake the very same exercise

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once again de novo under Section 36 of the Act and at that stage it will have the benefit of comprehensive consideration of the data furnished by the claimant establishment for exemption on the hand and the rival data furnished in rebuttal by the aggrieved employees on the other and then the opinion would become comprehensive and objective. In the setting of the Section, therefore, and the way it will work as discussed earlier, implicit in the section is the direction to the appropriate Government by the Legislature that it should form its opinion on objective facts furnished not only by the establishment or a class of establishments claiming such exemption but also by the employees who are likely to be affected by the exercise of such power and who should necessarily get an opportunity to submit their material rebuttal. If this requirement is not read in the Section the exercise of power of exemption qua the establishment or a class of establishments which will have a direct pernicious adverse effect on the employees who would otherwise earn statutory benefit of the provisions of the Act would always remain truncated, inchoate, half-baked and a still born exercise of power and only on remand by competent Court the exercise would become an informed one. Thus, the submission of the learned senior counsel for the appellants would make the exercise under Section 36 of the Act one in futility. To instill life in such an exercise and to make it comprehensive and kicking it has to be held that before an appropriate Government, which is approached by an establishment or a class of establishments for exempting them from the relevant provisions of the Act for a given accounting year, arrives at any opinion for exercise of such power it must take into consideration the rival version and material evidence in rebuttal furnished by the class of employees who are likely to be affected by such exercise of power and thereafter if such an opinion is arrived at by the appropriate Government on a comprehensive consideration of the rival versions and the power is exercised, such an exercise would not become vulnerable on the ground of non-application of mind on relevant facts and subject to the challenge of such exercise on the ground that it was a mala fide or

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colourable exercise of power or conditions precedent were not satisfied such an exercise of power would not be likely to be found fault with by any competent Court before which such an order under Section 36 is brought on the anvil of scrutiny. Therefore, in the aforesaid third category of cases even though the delegate is said to be exercising conditional legislative power it cannot be said to be entrusted by the Legislature with the function of a purely subjective nature based on its sole discretion, nor can it be said to be exercising such power for binding uniformly the whole class of persons without benefiting one class at the cost of the other class of persons who are subjected to the exercise of such exemption power. It must, therefore, be held that in such third category of class of exercise of power of conditional legislation objective assessment of relevant date furnished by rival classes of persons likely to be affected by such an exercise cannot be said to be ruled out or a taboo to such an exercise of power. It is also necessary to keep in view that in such category of cases the delegate exercising power of conditional legislation does not lay down a uniform course of conduct to be followed by the entire class of persons covered by the sweep of such an exercise but lays down a favourable course of conduct for a smaller class of persons at the cost of rival large category of persons covered by the very same exercise of power. To that extent there is a mini list between these two rival categories of persons likely to be affected by such an exercise by the delegate. Such exercise may also cover existing situations as well as future situations sought to be subjected to the exemption for the period prescribed in the order and may some times affect to any permissible extent even past transactions in individual cases. Such type of exercise of power cannot be said to rule out consideration of rival view point on the question of grant of exemption to an establishment or to a class of establishments from the relevant provisions of the Act. In the case before us the legislation has prescribed objective standards and has permitted the delegate to grant exemption and to withdraw the benefit of the statute which is being enjoyed by the persons and in our

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opinion, in such a situation, principles of fair play or consultation or natural justice cannot be totally excluded.

21. On the aforesaid conclusion of ours we cannot find fault with the decision rendered by the High Court that the impugned exemption notifications issued from time to time by the State of Tamil Nadu under Section36 of the Act were not legal and valid and they were issued without giving any opportunity whatsoever to the employees of the Housing Board to have their say when they were necessarily adversely affected by the exercise of such power even though it was an exercise of conditional legislative power. Such an exercise of power did not fall within any of the first two categories of delegated legislations but squarely fell within the third category of such an exercise of power."

17. The Supreme Court then considered the question whether the authority is bound to give hearing to the affected employees of the establishment before exercising the power of exemption under Section 36 of the given establishment like the Housing Board. The Court held that no personal hearing need be given to the employees likely to be affected by exercise of such power either personally or through their accredited representatives like the trade union leaders or others. However, while exercising such power under Section 36 of the Act, the affected employees must be given atleast an opportunity to put forward their rebuttal evidence or material against the material furnished by the claimant establishment so that the appropriate Government can have an objective assessment of the relevant data with a view to arriving at a rational, well-informed and reasonable opinion on a comprehensive consideration of pros and cons of the fact situations concerned calling for such an exercise of power on its part. The Court suggested the following steps for being followed by the appropriate authority when moved by any establishment or class of establishments for exemption under Section 36 of the Payment of Bonus Act:

1) When such applications are received by the appropriate Government which necessarily have to be supported by relevant data by the claimants, the receipt of such applications has to be brought to the notice of the employees likely to be affected by grant of such applications and for that purpose notices can be suitably got affixed by the appropriate Government on the notice boards of the concerns or factory premises of the establishments where the workmen are working

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mentioning the dates on which such applications are received and the grounds son which such exemptions are claimed under such applications.

2) Suitable public notice in newspapers having circulation in the areas of operation of such establishments can be got published and for that purpose suitable expenses can be required to be reimbursed by the claimants to the appropriate Government.

3) The concerned employees through their representative unions may, under these circumstances, be permitted to file their written representations with relevant data for rebutting the material furnished by the claimants so that the rival version put forward by the employees also will become available to the appropriate Government before it forms its opinion. For that purpose the public notice and the notice to be affixed on the notice boards of the concerns should indicate as to within what reasonable time such representations may be furnished with relevant data by the representative unions of the employees concerned.

4) Though it is not necessary for the appropriate Government before forming its opinion under Section 36 of the Act on the basis of the data furnished by the rival parties to give any personal hearing either to the claimant establishment or to the representative union of the employees. It may be still open in appropriate cases for the Government, if so thought fit, to give opportunity of personal hearing to the representatives of the establishments as well as of the employees if any elucidations required in this connection.

5) For making the aforesaid exercise effective if the concerned employees through their representative unions seek an opportunity to look into the material supplied by the establishments in support of their claims for exemption, inspection of such material can be made available to the unions of employees to enable them to file their representations and to furnish the data in rebuttal for opposing such claims.

6. Strict time schedule can be fixed by the appropriate Government within which the entire exercise can get completed so that the proceedings may not drag on for indefinite number of months. Under the circumstances, therefore, it would always be open to the appropriate Government on receipt of such applications for exemption under Section 36 to fix the

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time schedule of four to six weeks from the date of publication of such notices about receipt of applications for exemption as aforesaid within which the employees through their representative unions, if so advised, may file their representations and within the same time they may be given an opportunity, if so required, to have inspection of the material furnished by the claimant establishments in support of their claim applications. Once such time schedule is followed no written representations would ultimately be required to be entertained after the time limit fixed for receipt of such representations from the employees' union likely to be affected by the grant of such exemption so that within a short time thereafter as expeditiously as possible the appropriate Government can form its opinion, if any, and complete the exercise if it is of the opinion that all the requisite conditions for exercise of the power under Section 36 of the Act have been found to have existed qua the claimant-establishment or class of establishments for an appropriate period from which such exemption is to be granted".

18. The Court observed that the aforesaid steps are illustrative and not exhaustive. But they have to be read in Section 36 of the Payment of Bonus Act so as to make the section workable and the exercise of power can be insulated against attack on the ground of irrational exercise of power.

19. Bearing in mind the principles enunciated by the Supreme Court in Sabanayagam's Case it has also to be kept in view that the Tamil Nadu Shops and Establishment Act is a piece of welfare legislation enacted for the benefit of a large category of workmen seeking a living wage to make their lives more meaningful and for fructifying the benevolent guarantee of Article 21 of the Constitution. When the legislation has enacted such a beneficial piece of social legislation which already guarantees various aspects such as hours of work, payment of wages, health and safety, if the employers are to be allowed to earn exemption from the sweep of such a beneficial legislation which would ipso facto adversely affect the entire class of their employees, the conditions for exercise of such power of exemption have to be strictly and objectively fulfilled by the authority to whom such power is vested.

20. It was contended by Mr. Somayaji, that exemption under Section 36 of the Payment of Bonus Act stand on a different footing as it deprives the employee of his right to receive bonus whereas under Section 11 of the Shops and Establishment Act, there is no such deprivation inasmuch as his rights are protected under Section 14 of the Act. The contention though appears to be attractive, we are unable to accept the same. Fixation of weekly rest day having been founded on usage and treated as a customary

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privilege, changing it to some other day of rest might seriously prejudice the employees, (See Tata Iron and Steel Company Vs. Workmen, AIR 1972 SC 1917). Moreover, such exemption cannot be issued mechanically in respect of each and every establishment and the Competent Authority is obliged to consider the relevant data and to satisfy himself that such exemption is necessary in public interest and it would not affect the employees. In our opinion, power under Section 5 of the Tamil Nadu Shops and Establishments Act would fall under the 3rd category of the conditional legislation as laid down by the Supreme Court and in exercise of such power it would be obligatory on the part of the competent authority to follow the procedure as laid down by the Supreme Court. It is obvious that whenever such application is made by the establishment such exercise must be in public interest as a whole and not confined to the personal or private interest of the establishment or establishments concerned. The competent authority is to be satisfied that the employer is entitled to exemption. The employees who are likely to lose the protection of the various provisions of the Act would be adversely affected if such exemption is granted and therefore, it would be necessary for the competent authority to give opportunity to the employees or their representative or Union to place a detailed rebuttal evidence. Ordinarily, whenever such application is made by the employer to the competent authority for the grant of exemption under Section 11 or any other Section of the Act, then the concerned authority should cause notice to be published in the premises of the establishment and wherever it is necessary a suitable public notice in newspapers can also be given requiring the employees or their union to give their rebuttal evidence before the authority and final decision has to be taken after considering the materials placed before him. It is not obligatory for the competent authority to grant any personal hearing to the employees but wherever the competent authority feels that such hearing is necessary, may grant personal hearing to both sides. It is needless to say that the Competent Authority is required to maintain the strict time schedule within which the entire exercise shall be completed so that the proceedings may not drag on for indefinite time. Therefore, notice should ordinarily state that the objections/materials to be submitted by the employees or representatives within a fixed period and on receipt of such material, the competent authority could pass appropriate orders in the facts and circumstances of the case.

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21. The writ appeal is disposed of accordingly and the order of the learned single Judge stands modified to the extent indicated above. No costs. Consequently, M.P. No.1/2006 is closed.

vbs/

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

The Deputy Commissioner of Labour I
DMS Anna Salai, Chennai-6.

+ one cc to Mr. S. Badrinath, Advocate sr no. 61868
+ one cc to the Government Pleader sr no. 61610
+ one cc to MR. S. Jayaraman, Advocate sr no. 61599

SSR(CO)
NM(10.01.07)

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